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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

MATT T. KOKKONEN,

Petitioner,

v.

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for the States of Ohio, Alaska, Illinois, Kansas, Massachusetts, Montana, Oklahoma, Pennsylvania, Virginia, and the District of Columbia as Amici Curiae in Support of Petitioner

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INTEREST OF THE AMICI CURIAE

The States that have joined this brief as amici curiae are concerned about the untenably broad conception of federal jurisdiction asserted in the ruling below. As repeat litigants in the federal courts, the States have a profound interest in being able to ascertain and predict the finality of litigation. This interest is especially marked as the States often must litigate in the difficult and complex setting of institutional reform litigation. Federal cases involving judicial oversight of state school systems, state prison systems, and a multitude of state programs and facilities throughout the social services field raise important questions involving state sovereignty. They also regularly and substantially implicate state finances and revenue.

A holding that dismissal of litigation because the parties reached a contractual settlement would subject them to further monitoring and other constraints imposed thereafter by a federal court would unjustifiably extend the proper subject-matter jurisdiction of the federal courts. It also would severely undercut the settled expectations of litigants, which often are formed after prolonged and contentious negotiations that focus at least in part on the different implications that flow from resolution by a consent order rather than by a settlement agreement.

Difficult questions about the proper relationship between the federal and state governments would be exacerbated if federal courts are permitted to assert such extensive power. Holdings like that reached by the court below, which rest federal subject-matter jurisdiction on implication or on a generalized reference to an amorphous "supervisory jurisdiction," are especially troublesome for litigating States. Application of this approach would be inherently uncertain and unpredictable. Such rulings, moreover, would confer upon the lower federal courts a possibly perpetual authority over former parties merely because a lawsuit was once filed, even though it was later dismissed by stipulation or order.

The ruling below also intrudes unnecessarily upon the proper role of the state courts in our federal system. State court is the proper forum for trying claims that the terms of a settlement contract have been breached, absent diversity jurisdiction. Any other rule would threaten to clog the federal judicial system with endless matters whose cumulative impact could eventually overwhelm the institutional capacity of the federal trial courts.

ISSUE PRESENTED

Does a federal district court have subject-matter jurisdiction to enforce a settlement agreement executed between the parties when the underlying case already has been dismissed and the stipulation or order of the court that disposed of the action contains no terms or conditions binding upon the parties?

SUMMARY OF ARGUMENT

This Court should confine the generalized "supervisory jurisdiction" of the federal courts to the few limited circumstances established in this Court's precedents. Any more expansive application of this "supervisory jurisdiction" is incompatible with a proper understanding of judicial self-restraint, threatens accepted principles of federalism, and violates the separation of powers. The ruling below, which invoked this "supervisory jurisdiction" in an improper and uncontrolled manner, should be reversed.

Courts in both the federal and state systems have historically recognized that a settlement agreement reached between the parties is a private contract, enforceable by the standard means of bringing a civil action under the common law. It differs sharply from a consent order or decree entered by the court, which involves the court in continuing jurisdiction and oversight over the parties, subjects the parties to contempt sanctions for noncompliance with its terms, restricts the parties in their ability to modify its terms, and imposes heightened demands on scarce judicial resources.

The proper rule to determine whether a court has subject-matter jurisdiction over a lawsuit that has concluded depends on whether the court has entered a formal order or decree containing terms or conditions that legally bind the parties. If the court has not done so, but has simply entered an order of dismissal because a settlement agreement was reached between the parties, then its proper jurisdiction is at an end. The clarity of this rule should not be lost by hinging this determination on such amorphous factors as whether a settlement was reached at any particular stage of the lawsuit, whether the judge actively participated in settlement negotiations, what subjective intentions may have been indicated by the judge, or whether the settlement was memorialized in the record transcript rather than reduced to a separate writing.

The strong public policy in favor of settling litigation by agreement between the parties would be disserved by affirmance in this case. This Court has recognized and endorsed this strong public policy in various settings because it promotes a more complete and more practical resolution of disputes, tends to conserve scarce judicial resources, and conforms to a proper understanding of judicial self-restraint. The ruling below plainly disserves these principles.

ARGUMENT

I. THIS COURT SHOULD CONFINE THE GENERALIZED "SUPERVISORY JURISDICTION" OF THE FEDERAL COURTS TO THE FEW LIMITED CIRCUMSTANCES ESTABLISHED IN THIS COURT'S PRECEDENTS.

In an unpublished per curiam ruling, the court below casually invoked the " 'inherent supervisory power' " of the federal courts to conclude that subject-matter jurisdiction exists to enforce a settlement agreement after the underlying litigation has been terminated by voluntary dismissal. Pet. App. A-5 (quoting *Wilkinson v. FBI*, 922 F.2d 555, 557 (9th Cir. 1991); see also J.A. 89-91 (stipulation and order of

dismissal). This action was improper. The supervisory jurisdiction as it has been framed by this Court does not reach so far. If it were to be thus extended, then reviewing courts would be hard put to deny a boundless jurisdiction in the trial courts to supervise many other aspects of the further relations among persons who were once parties to a lawsuit before that court, without regard to precisely how that lawsuit may have been resolved.

A. A FEDERAL SUPERVISORY JURISDICTION EXISTS ONLY IN CERTAIN VERY LIMITED CIRCUMSTANCES.

This Court's increasingly infrequent references to the supervisory jurisdiction of the federal courts were misapplied in the ruling below. The Court has indicated that any such "supervisory jurisdiction" applies only in three quite limited circumstances, as established in its earlier precedents.

First, the Court has referred to a supervisory jurisdiction that is truly grounded in statutory authority. For example, the Court has found a supervisory jurisdiction to enforce the duty of fair representation, which arises from the terms of the National Labor Relations Act. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Similarly, the Court has noted in some of its older cases that federal statutes at times have conferred a specific supervisory jurisdiction on designated courts in particular areas of federal law. *See, e.g., Radio Corp. of Am. v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 4 (1934) (patent law); *Holden v. Stratton*, 191 U.S. 115, 117 (1903) (bankruptcy law); *Taylor v. Voss*, 271 U.S. 176, 180-86 (1926) (same).

Second, this Court has occasionally invoked its own supervisory jurisdiction over the administration of criminal justice in the lower federal courts. *Elkins v. United States*, 364 U.S. 206, 216 (1960). The Court has claimed this authority to define the scope of various procedural matters, such as evidentiary privileges devised at the common law, *see McCray v. Illinois*, 386 U.S. 300, 309 (1967), and evidentiary and other procedural rules, *see, e.g., Mesarosh v. United States*, 352 U.S. 1, 14 (1956); *McNabb v. United States*, 318 U.S. 332, 340-41 (1943). This authority, which is of somewhat uncertain foundations and perhaps dubious current validity, might appear to trace its source to earlier applications of the All Writs Act, 28 U.S.C. §1651; *see, e.g., La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).[1]

Third, this Court has indicated that the federal courts possess a supervisory jurisdiction to oversee compliance with the terms and conditions of their own decrees. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 683-84 (1978). Enforcement of such terms and conditions can be had from the court that issued the decree, whether or not it was entered with the consent of the parties. *See, e.g., Railway Employees v. Wright*, 364 U.S. 642, 651-52 & n.7 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932). This jurisdiction is grounded upon the traditional equitable and contempt powers that courts developed at the common law to control enforcement of their own orders and decrees. It should be noted, however, that this oversight is narrowly limited to a court's enforcement of the binding terms imposed in its own orders. The sole justification for this power is that the court's orders themselves constitute law and carry the force of law. *See, e.g., Swift*, 286 U.S. at 115 ("We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act."). Further judicial enforcement of the binding terms set out in a court order is therefore authorized in order to ensure that the court's own legitimate and lawful authority will be upheld.

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[1] Many state courts possess a similar broad authority that is explicitly granted in the judicial article of their state constitutions. *See, e.g.*, Ohio Const. art. IV, §5 ("the supreme court shall have general superintendence over all courts in the state").

B. EXPANSIVE APPLICATION OF THE SUPERVISORY JURISDICTION IS INCOMPATIBLE WITH A PROPER UNDERSTANDING OF JUDICIAL SELF-RESTRAINT, THREATENS ACCEPTED PRINCIPLES OF FEDERALISM, AND VIOLATES THE SEPARATION OF POWERS.

Beyond the limited concepts set forth above, the federal courts do not possess and cannot invoke any unconfined residual jurisdiction. Any such claimed authority, which does not apply a statutory provision or enforce the terms of any order or decree that has the binding force of law, is simply illegitimate.

The federal courts only possess that jurisdiction which is conferred upon them by established law. They cannot extend their jurisdiction to satisfy even the unanimous desire of the parties, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), any more than they can do so in accordance with their own wishes, *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."). As the Seventh Circuit has well described the purported supervisory jurisdiction at issue here: "No statute confers such a jurisdiction and we hesitate to use so formless a concept as inherent power to give the federal courts an indefinite jurisdiction over disputes in which the federal interest may be nonexistent." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1187 (7th Cir. 1985).

This self-nominated expansion of the jurisdiction of the federal courts would also intrude upon the proper judicial realm of the States. Put forward as a supposed application of the federal supervisory jurisdiction, this claim of authority is simply in error. This Court has repeatedly stressed that it possesses no supervisory jurisdiction over the state courts, *Chandler v. Florida*, 449 U.S. 560, 570 (1981), and neither do the lower federal courts. *Cf. Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Ct. App. v. Feldman*, 460 U.S. 462 (1983). Yet the assertion of such authority in this case would work a direct interference with the state

court system, which is the recognized forum in which to resolve contract disputes that arise between citizens of the same State.

The lower federal courts have recognized that even after a case has been dismissed because the parties reached a settlement, a disgruntled party may bring a motion for relief from the dismissal under Rule 60(b). *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 623 (8th Cir. 1987); *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299, 1302-03 & n.8 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978). The motion must be made "within a reasonable time," and may be based on any reason "justifying relief." Fed. R. Civ. P. 60(b)(6). Upon a proper showing, the previous dismissal may be set aside and the case reinstated on the court's docket. This action, however, only reinstates the court's proper basis for jurisdiction over the parties, which rests upon the substantive claims raised in the original lawsuit. It does not provide the court with any independent jurisdictional foundation to resolve a request to enforce terms of a settlement previously executed between the parties. *See, e.g., Adduono*, 824 F.2d at 623; *Fairfax County*, 571 F.2d at 1302-03 & n.8.

To sanction such a freewheeling resolution of disputes over enforcement of the settlement contract would be to allow the federal courts to make a clear end-run around the ordinary and traditional processes of the state judicial systems. No doctrine of necessity requires this power to be exercised by the federal courts, since the state courts stand available to adjudicate such claims and resolve disputes. *Cf. Young v. United States ex rel. Vuitton*, 481 U.S. 787, 819-22 (1987) (Scalia, J., concurring) (rejecting similar claim of necessity because other avenues were available to enforce the law). As this Court has emphasized, the federal courts should be sensitive to intruding unnecessarily on the traditional functions exercised by the state courts. *Cf. Younger v. Harris*, 401 U.S. 37 (1971) (abstention); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (same).

Finally, for the federal courts to expand their own jurisdiction in this manner, upon their own initiative, would violate the separation of powers. The federal jurisdiction is inherently limited and provided by statute. *E.g., Sheldon*, 49 U.S. at 449. The "judicial Power," as vested by Article III, authorizes the courts in addition to enforce their own proper orders, which, by definition, constitute binding law. But the federal courts do not have the authority to broaden their own jurisdiction by any other means. *See, e.g.*, Fed. R. Civ. P. 82 (civil rules "shall not be construed to extend or limit the jurisdiction of the United States district courts"); *Turner v. Bank of North Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799).

C. THE RULING BELOW INVOKED THE "SUPERVISORY JURISDICTION" OF THE FEDERAL COURTS IN AN IMPROPER AND UNCONTROLLED MANNER.

The court below presented no explanation or justification for its reliance on the " 'inherent supervisory power' " of the federal courts to assume jurisdiction in this matter. Pet. App. A-5 (quoting *Wilkinson*, 922 F.2d at 557). The court's passing reference to this supposed residual power is most troubling because it simply presumes that any such power can be invoked whenever a federal court finds it useful or convenient to do so.[2]

In this case, however, no such power can be squared with the precedents of this Court. First, none of the lower courts that have ruled on this issue has purported to find

[2] Indeed, the court below appears to have improperly extended its prior precedents without explanation. The line of Ninth Circuit cases that the court relied on in *Wilkinson*, which primarily comprises bankruptcy cases, had actually held that "a court has inherent power to enforce summarily a settlement agreement *involving an action pending before it.*" *In re Suchy*, 786 F.2d 900, 902-03 (9th Cir. 1986) (emphasis added); *see also Crown Life Ins. Co. v. Springpark Assocs.*, 623 F.2d 1377, 1380 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980). The extension of these authorities without comment to the very different situation where the original action is no longer pending was unjustified.

such generalized authority in any pertinent federal statute. And there is none.[3] Second, the ruling below obviously cannot be harmonized with any authority this Court may have to supervise the administration of criminal justice in the lower federal courts. Third, and most pertinent, the authority of a court to enforce the binding terms and conditions contained in its own lawful orders simply does not extend to the contractual terms of a settlement agreement that are not imposed in an actual order issued by the court.[4] Here, the original lawsuit was dismissed by stipulated order under Federal Civil Rule 41(a), and the court imposed no binding terms upon the parties. *See* J.A. 89-91. Therefore, no basis for the court's continuing jurisdiction was lawfully established in this case.

The "supervisory jurisdiction," as this Court has stressed, is not conferred upon the federal courts by statute or under any express provision in the Constitution. Such authority is to be narrowly construed and applied, and does not afford the federal courts "a roving commission to supervise" activities in our society that do not come within their proper authority. *In re Josephson*, 218 F.2d 174, 177 (1st Cir. 1954). The hallmark of our judicial system is its openness to all who seek redress. Yet ours is not an inquisitorial system, in which the courts are empowered to reach out on their own initiative to right all ills that may be brought to their

[3] It should be noted also that the All Writs Act, 28 U.S.C. §1651, does not provide a defensible basis for the enforcement orders imposed in this case. First, that statute can be applied only "in aid of [a court's] jurisdiction[,]" and not to create such jurisdiction. *Id.* Second, under the statute writs can be issued only when "agreeable to the usages and principles of law," *id.*, which for all the reasons set forth above is not true in the circumstances of this case.

[4] Even *In re Debs*, 158 U.S. 564 (1895), which embraced an expansive view of the federal courts' power summarily to punish contempts, and which was later disapproved by this Court, *see Bloom v. Illinois*, 391 U.S. 194 (1968), understood the courts' authority to flow entirely from this source, *viz.*, the power to issue orders with the binding force of law: "the power of a court to make an order carries with it the equal power to punish for a disobedience of that order." 158 U.S. at 594.

attention outside their proper sphere. *Young*, 481 U.S. at 816 (Scalia, J., concurring) ("the power to seek out law violators in order to punish them . . . would be quite incompatible with the task of neutral adjudication"). In the absence of a court order that explicitly stands as continuing law binding upon the parties, then once a lawsuit has been terminated, the proper judicial power is at an end. The amici curiae respectfully urge that the Court should so rule in this case.

II. A CONTRACTUAL SETTLEMENT AGREEMENT EXECUTED BETWEEN THE PARTIES IS ENTIRELY DIFFERENT FROM A JUDICIAL CONSENT DECREE ENTERED AS AN ORDER OF THE COURT.

The ruling below is in error because it confused two distinct legal phenomena: a contractual settlement agreement reached between the parties and a judicial consent decree entered as an order of the court. This confusion threatens to undermine the settled expectations of parties, for whom the distinction is typically obvious and understood. Indeed, the basic differences between a settlement agreement and a consent decree often become central issues in negotiating a resolution of pending litigation, as is widely recognized. *See, e.g.*, Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 325-27 (1988).

A. A SETTLEMENT AGREEMENT AND A CONSENT DECREE DIFFER ON THE COURT'S CONTINUING JURISDICTION AND OVERSIGHT OVER THE PARTIES.

The most fundamental difference between a contractual settlement agreement and a judicial consent decree lies in the fact that the former, but not the latter, effects a termination of litigation between the parties by private means. A settlement agreement is a mere contract between the parties, in which they agree to abide by specified terms. One of those terms is that litigation pending between the parties will be dismissed by joint stipulation. But the remainder of the terms are executed solely between the parties and

become binding upon them insofar as the law recognizes and enforces such mutual obligations. In this respect, a settlement agreement is subject to all the ordinary doctrines developed in the common law of contracts.

A settlement agreement does not by itself effect the termination of litigation. That result occurs instead in conformity with Rule 41(a) of the Federal Rules of Civil Procedure. The Court must accept "a stipulation of dismissal signed by all parties," Fed. R. Civ. P. 41(a)(1)(ii), which may contain such terms as were agreed between the parties. The stipulation is self-executing and does not depend for its efficacy on the entry of any order by the court. In certain situations, moreover, dismissal can occur "upon order of the court." *See id.* 41(a)(2). In the latter situation, the court may impose "such terms and conditions as the court deems proper." *Id.*; 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2366 (1971 & 1993 Supp.). Very often, however, dismissal is stipulated or ordered without any specification of terms or conditions, which instead are negotiated and resolved in a separate settlement agreement.

In contrast, a judicial consent decree terminates litigation by direct order and judgment of the court. The court's order again may include terms and conditions, but its principal feature is that it represents a formal judgment by the court which resolves the litigation on the merits. Such an order stands as binding law upon the parties. *See, e.g., Spallone v. United States*, 493 U.S. 265 (1990); *Swift*, 286 U.S. at 115. As such, it subjects the parties to continuing jurisdiction and oversight by all means traditionally available to the court, including the possibility of proceedings to enforce the terms and conditions of the court's order.[8] But it is the existence

[8] This distinction is so significant that the Federal government adopted a specific policy containing limitations on entry into consent decrees, though settlement agreements were still strongly encouraged. *See* Att'y Gen. Mem., "Justice Dep't Policy Regarding Consent Decrees and Settlement Agreements" (Mar. 13, 1986), *reprinted in* Note, *Separation of Powers and the Reagan Administration's Policy on Consent Decrees: Have the Courts Overstepped the Limits of Judicial Powers?*, 1989 U. Ill. L. Rev. 541 (app.). Some States have adopted similar

and force of the court's lawful order alone that extends the judicial authority in these respects. No such order is created by a mere contractual agreement among the parties. "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *Wright*, 364 U.S. at 651.

B. A SETTLEMENT AGREEMENT AND A CONSENT DECREE DIFFER ON THE METHODS AND SANCTIONS AVAILABLE TO ENFORCE THEIR TERMS.

Once litigation has been dismissed, a settlement agreement that has not been embodied in a judicial order is enforceable in the same manner as any other contract. The established mechanism to enforce a contract, and hence also a settlement agreement, is to bring a civil action. The action may seek damages, such as expectation damages or reliance damages. It may seek enforcement by specific performance or injunctive relief. *See generally* E. Farnsworth, *Contracts*, ch. 12 (1982). Because such an action is brought at the common law, it must be prosecuted in state court unless the parties are subject to federal diversity jurisdiction. *See, e.g., Adduono*, 824 F.2d at 623; *Fairfax County*, 571 F.2d at 1302-03 & n.8.

In contrast, a consent decree is enforceable in the same manner as any other judgment entered by the court. If its terms involve monetary payment, it may be enforced by the seizure and sale of assets to satisfy the specified amounts. More often, the terms and conditions contained in a consent decree are tantamount to the contents of an injunction, and will be enforced as found proper through the traditional contempt powers of the court. These powers, which include imposition of fines and imprisonment, can be invoked either

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[5] *Footnote 5 cont.*
restrictions. *See, e.g.*, Pa. Stat. Ann., tit. 71, §§732-204(e) (1990) (Attorney General "shall not agree to the entry of a consent decree in any action against the Commonwealth or any agency without the approval of the Governor and notice to the General Assembly").

by civil or criminal contempt proceedings. *See, e.g., Spallone*, 493 U.S. at 276 (consent decree can be enforced by civil contempt); *Martin v. Wilks*, 490 U.S. 755, 788 (1989) (Stevens, J., dissenting) ("violation of a consent decree is punishable as criminal contempt"). The scope of these remedial powers is limited by various principles devised over the long history of the equitable powers of the courts.

C. A SETTLEMENT AGREEMENT AND A CONSENT DECREE DIFFER ON THE CIRCUMSTANCES THAT JUSTIFY MODIFICATION OR AVOIDANCE OF THEIR TERMS.

A settlement agreement, as a species of contract, can be modified by simple agreement between the parties. This may be done orally, though some jurisdictions require modifications to be made in writing. Modification through judicial action can also be sought by bringing a civil suit for reformation of the contract terms, and will be granted upon a satisfactory showing of mutual mistake or fraudulent misrepresentation. *See generally* E. Farnsworth, *supra*, §§7.5 & 7.6.

In contrast, modification of a consent decree is subject to entirely different standards. Any proposed modification must be submitted to the original court for its approval, such as by a motion under Federal Civil Rule 60(b)(5), and approval is not granted as a matter of course. Indeed, for many years this Court has held that a consent decree should not be changed unless the court is presented with "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Swift*, 286 U.S. at 119. Just last year, this Court revisited this rule and revised it by holding that in "institutional reform litigation" a consent decree can be modified when "a significant change in facts or law warrants revision of the decree" and "the proposed modification is suitably tailored to the changed circumstance." *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 765 (1992).

In addition, a settlement agreement can be avoided, breached, or terminated in the same manner as any other

contract, subject to possible liability in accordance with the rules developed at the common law. *See, e.g.*, E. Farnsworth, *supra*, ch. 8. It also is subject to rescission by a court if a party seeking avoidance of the agreement proves misrepresentation in the inducement. It is notable, however, that rescission of a settlement agreement would not *ipso facto* reinstitute the prior litigation once it has been dismissed. Such a result can only be pursued by bringing a motion for relief from the dismissal under Federal Civil Rule 60(b)(6).

By contrast, again, a consent decree cannot be avoided or terminated except by order of the court. Many such decrees are tantamount to injunctions that require private parties to comply with the law, and thus are intended to operate in perpetuity. *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (discussing consent decree in *Swift*). In institutional reform litigation, the duration of a consent decree is more limited, but such decrees nonetheless are not routinely vacated except on some substantial showing of good-faith compliance. *See, e.g., id.* at 249-50; *Freeman v. Pitts*, 112 S. Ct. 1430, 1445-46 (1992).

D. A SETTLEMENT AGREEMENT AND A CONSENT DECREE DIFFER IN THE DEMANDS THEY IMPOSE ON SCARCE JUDICIAL RESOURCES.

As intimated above, the practical realities of enforcing a contractual settlement agreement are that such enforcement will most often occur through extrajudicial methods. Problems of interpretation, of compliance with the terms and conditions, or of their subsequent modification or repudiation, usually will be resolved between the parties in exactly the same manner that most private contract issues are resolved, without resort to the filing of a lawsuit.

By contrast, a judicial consent decree uniformly exposes the parties to a likelihood of further judicial proceedings that are recurrent and prolonged in nature. Issues of interpretation, compliance, modification, avoidance, and termination must very often be presented to the original court

for guidance and resolution. *See, e.g., Dowell, supra; Freeman, supra; Rufo, supra.*[6] The cumulative effect of terminating lawsuits by this means, far from clearing the court's docket and limiting the demands on its current resources, instead invests it with direct authority over increasing tracts of modern life and obliges it to monitor the continuing relations among former litigants, whether in the private or the public sector, perhaps even in perpetuity. The demands on scarce judicial resources from the enforcement of judicial consent decrees thus are potentially immense.

III. THE PROPER RULE TO DETERMINE WHETHER A COURT CORRECTLY RETAINS JURISDICTION OVER THE PARTIES AFTER A LAWSUIT HAS CONCLUDED DEPENDS ON WHETHER THE COURT ENTERED A FORMAL ORDER CONTAINING BINDING TERMS SUBJECT TO FURTHER ENFORCEMENT OR WHETHER INSTEAD THERE WAS A DISMISSAL BECAUSE A CONTRACTUAL SETTLEMENT WAS REACHED BETWEEN THE PARTIES.

The significant differences between a settlement agreement and a consent decree strongly argue for this Court to lay down a bright-line rule to distinguish between them. The parties must be able to know, with a minimum of uncertainty, whether their decisions about how to resolve a pending lawsuit will place them on one side of this line or the other, with all the attendant consequences for their further conduct that are described above.

The plain and proper rule, as indicated previously, is that

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[6] Courts typically draw upon contract law in interpreting consent decrees, such as by limiting their consideration to the "four corners" of the decree. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). This is thus one respect in which consent decrees may be said to "' have attributes both of contracts and judicial decrees.' " *Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975)).

when a lawsuit ends by dismissal under Rule 41(a), and the stipulation or order that disposes of the action does not contain any legally binding terms or conditions, then the parties are not subject to continuing jurisdiction and oversight by the courts. Instead, the relations between them return to the ordinary status of private contracting parties. In the face of litigation that was dismissed without binding terms and conditions imposed in a lawful court order (one of which might be, but need not be, an explicit retention of jurisdiction over the parties), no law has been established by court decree, and thus no judicial authority remains to decide anything, to render judgment on any issue, or to exercise continuing jurisdiction over any cause previously asserted between the parties. *Cf. International Longshoremen's Ass'n Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 74 (judicial decree cannot be enforced unless it contains "an operative command capable of 'enforcement' ").

Respondent's various suggestions in this case for how the Court might blur this bright-line rule, whether taken singly or in combination, are incorrect and should be firmly rejected.

A. THE PROPER RULE SHOULD NOT TURN ON WHETHER SETTLEMENT WAS REACHED AT ANY PARTICULAR STAGE OF THE LAWSUIT.

Respondent suggests that because the settlement and stipulation of dismissal were agreed in this case at the latter stages of a three-day jury trial, indeed after the closing arguments, it was proper for the court to retain jurisdiction even after the case had concluded. Opp. at 7, 13, 16. This suggestion, however, does not afford a workable rule of decision.

There is no basis in law for a court's continuing subject-matter jurisdiction to turn on the stage of the proceedings at which a case is resolved. Any such rule would create grave uncertainty for the parties, and would require the courts to impart artificial importance to preliminary mechanisms that are intended to be employed solely to improve and guide

the processing of lawsuits. It would discourage settlement discussions as the trial date approached, in contravention of the Federal Civil Rules. *See* Fed. R. Civ. P. 16(c)(7) adv. comm. note ("settlement should be facilitated at as early a stage of the litigation as possible [but a] settlement conference is appropriate at any time"). It also would embroil the lower courts in unwelcome confusion until this Court were to set forth more extensive guidance about the significance to be attached to different stages of litigation for these purposes.

B. THE PROPER RULE SHOULD NOT TURN ON WHETHER THE JUDGE ACTIVELY PARTICIPATED IN SETTLEMENT NEGOTIATIONS.

Respondent also suggests that because the trial judge "actively participated" in the settlement discussions in this case, and perhaps because the settlement was actually reached in the judge's chambers, it was proper for the court to retain jurisdiction to enforce the terms of the settlement even after the case was dismissed. Opp. at 7, 14-15. The suggestion is incorrect.

First, the court's retention of subject-matter jurisdiction over a case cannot be made to turn on the activities engaged in by individual judges aside from those actions which inherently possess the force of law, such as the entry of formal judgments and orders. Again, there is no legal basis for any such rule. In addition, no firm ground offers itself for defining when the judge's participation in settlement negotiations becomes "active" enough to justify such a determination. Depending upon the objectives of the parties, moreover, any such rule may discourage the parties from seeking the judge's intervention or could inhibit the judge from taking a free hand in advancing an agreed resolution of the lawsuit. This result would be extremely undesirable, given the increasingly important role that judicial intervention now plays in securing agreed settlements among litigants. *See, e.g.*, Fed. R. Civ. P. 16(c)(7) & adv. comm. note. *See generally* Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306 (1986).

C. THE PROPER RULE SHOULD NOT TURN ON THE SUBJECTIVE INTENTIONS MANIFESTED OR ARTICULATED BY THE JUDGE.

Respondent further contends that the trial court was correct to retain jurisdiction in this case because the judge "plainly anticipated that he would entertain any post-dismissal motions regarding the settlement agreement." Opp. at 6. Respondent bases this contention on a lower court decision holding that a court can "impliedly" retain jurisdiction over a case that is dismissed by giving enough indicia to allow the inference that the court intended to do so. *See id.* at 9-12 (discussing *McCall-Bey*, 777 F.2d 1178). The Court should decline to adopt this loose approach.

The proposed rule of implication clashes with the established principle that judges are not authorized to assert (or retain) subject-matter jurisdiction merely because they think it would be best to do so, whatever their reasons. *Bender*, 475 U.S. at 541; *Sheldon*, 49 U.S. (8 How.) at 449. Jurisdiction can only be conferred by some binding source of law, such as a statute or a properly framed court order. And the proposed rule offers no solid foundation for parties and the lower courts in assessing such issues. The necessary indicia would give rise to endless difficult quarrels about the true intentions of the judge. It would leave the parties uncertain about whether they have concluded a contractual settlement or a consent decree until the trial court revisited the issue and made up its own mind upon a later occasion. This uncertainty itself could discourage settlements.

The proposed rule also would open up an unwarranted inquiry into the subjective intentions of the trial judge. The two possible regimes are both undesirable. On the one hand, the parties could find themselves at the mercy of the trial judge's post-hoc determination about what his intentions were as an original matter, with the judge's ruling serving as a final word that is not realistically subject to challenge on appeal. On the other hand, the parties could mount the bizarre prospect of an appeal that assesses the objective evidence and disagrees with the trial judge's own later

statement of his own previous intentions. Either way, as the court conceded in *McCall-Bey*, it is clear that "the more explicit the district judge is about retaining jurisdiction the less room there is for a dispute, as in this case, over whether he did so." 777 F.2d at 1188. The only explicit and proper way to do so, however, is to resolve the case by a stipulation or order of dismissal that contains specific terms and conditions that legally bind the parties. *Cf. International Longshoremen's Ass'n*, 389 U.S. at 74 (judicial order cannot be enforced unless it contains "an operative command capable of 'enforcement' ").

D. THE PROPER RULE SHOULD NOT TURN ON WHETHER THE SETTLEMENT BETWEEN THE PARTIES IS MEMORIALIZED IN THE RECORD TRANSCRIPT.

Finally, respondent claims that because the settlement agreement in this case was placed on the record transcript, it was proper for the trial court to retain jurisdiction over any claims to enforce that agreement. Opp. at 6-7, 13. This claim is unfounded.

The record transcript is simply a memorialization of the proceedings. It provides a means of preserving the evidence of what has transpired, but does not itself constitute any order or judgment of the court. Indeed, the Federal Civil Rules expressly separate a formal judgment order from any such written record: "Every judgment shall be set forth on a separate document." Fed. R. Civ. P. 58. The record transcript thus should properly be understood as presenting evidence of the terms of a contract reached between the parties, but not as a determinative document in its own right. Here, for example, the oral settlement agreement between the parties was placed on the record for reasons of convenience, and indeed was not reduced to writing in any separate document or order at respondent's *own* insistence. Pet. at 4.

In sum, none of the factors asserted by respondent should be adopted by this Court to blur the clear line between a settlement agreement and a formal consent decree. Neither

singly nor in combination do they provide a defensible basis for defining the proper subject-matter jurisdiction of a federal district court.

IV. A DECISION BY THIS COURT AFFIRMING THE RULING BELOW WOULD DISSERVE THE STRONG PUBLIC POLICY THIS COURT HAS RECOGNIZED IN FAVOR OF SETTLING LITIGATION BY AGREEMENT BETWEEN THE PARTIES.

A. THIS COURT HAS RECOGNIZED AND ENDORSED A STRONG PUBLIC POLICY IN FAVOR OF SETTLING LITIGATION BY AGREEMENT BETWEEN THE PARTIES.

As respondent points out, the Court has long endorsed a sound public policy favoring the agreed settlement of litigation. Opp. at 17. "Compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). This policy has been applied across the spectrum of situations where disputes are brought for consideration and resolution. *See NLRB v. Food & Commercial Workers*, 484 U.S. 112, 128 (1987) (emphasizing importance of settlements, which are the "lifeblood" of the administrative process).

This strong public policy can be seen also in the Court's substantial change of direction to favor the enforcement of contractual agreements that require binding arbitration of disputes which could properly be raised and resolved in the federal courts. At one time, such agreements were disfavored by the courts, which contended that they improperly allowed the parties to circumvent the proper channels of the judicial system. *See, e.g., Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (Frank, J.) (discussing "the old judicial hostility to arbitration"). More recently, however, this Court has now held in many different settings that such agreeements should be enforced even at the expense of the courts' own jurisdiction, because they promote the extrajudicial settlement of

disputes. *See, e.g., Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (RICO and securities claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims). The Congress has endorsed this same public policy in the federal arbitration statutes. *See* 9 U.S.C. §2.

All parties are understood to gain from mechanisms that will speed the resolution of disputes and thus also minimize their expense and inconvenience. "In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *see id.* (Fed. R. Civ. P. 68 "expresses a clear policy of favoring settlement of all lawsuits"); Fed. R. Civ. P. 16(c)(7) & adv. comm. note.

B. THESE PRINCIPLES ARE JUSTIFIED BECAUSE THEY PROMOTE A MORE COMPLETE AND MORE PRACTICAL RESOLUTION OF DISPUTES, CONSERVE SCARCE JUDICIAL RESOURCES, AND REFLECT A PROPER UNDERSTANDING OF JUDICIAL SELF-RESTRAINT.

The policy favoring extrajudicial resolution of lawsuits by agreement between the parties is justified on several counts. First, it is thought to promote a more complete and more practical resolution of disputes because the parties are involved in fashioning any such compromise, and they must be willing to accept it. These facts make it more likely that the resolution will be workable and that it will secure voluntary compliance in the future. Indeed, the same approach pervades the remedial phase of much institutional reform litigation, in which the parties are encouraged or perhaps even coerced to work with one another to initiate an appropriate remedy rather than having it imposed by the court in the first instance. *See, e.g., Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 427-28 (1976).

Second, the settlement of litigation by agreement is widely regarded as tending to minimize the crushing demands on scarce judicial resources. It cannot be denied that settlement

of the vast majority of disputes by private means is simply essential if the current judicial system is to function at all. "The litigation model has changed so much that trial remains not so much the exception as a veritable freak." Attanasio, *Foreword: A Duty-Oriented Procedure in a Rights Oriented Society*, 63 Notre Dame L. Rev. 597, 601 (1988). Thus, an increasing array of mechanisms is being considered and implemented to promote the extrajudicial resolution of disputes. *See generally Symposium on Litigation Management*, 53 U. Chi. L. Rev. 305 (1986).

Third, resolution of litigation by mere agreement between the parties is in harmony with a judicial system that is not itself inquisitorial or self-initiating, but instead is available as the passive servant of individuals or entities who seek redress for violations of law. *Cf. U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992) ("vacatur of the judgment at trial is appropriate when settlement moots the action on appeal"), *cert. dismissed sub nom. Izumi Seimitsu Kogyo v. U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993). The rules so painstakingly developed by this Court to govern issues such as waiver, default, standing, mootness, ripeness, and the like are all considered proper because they minimize judicial intrusion in to everyday affairs and ensure that judicial intervention is fully warranted before it is undertaken. In a society marked by a fierce protection of individual liberty, it is desirable for litigants to adjust their differences on their own so that courts can refrain as much as possible from making more ubiquitous the heavy hand of the law. This objective is served by a judicial self-restraint that encourages parties to resolve disputes other than by court order.

C. THE RULING BELOW DISSERVES THESE PRINCIPLES.

The ruling below is antithetical to these principles favoring the resolution of disputes by agreement between the parties. The determination that federal courts have supervisory jurisdiction to enforce the terms of contractual settlement agreements between the parties means that such lawsuits would not truly be resolved at all. Instead, they would forever

have the potential to spring to life again any time one party becomes disgruntled with another party's unsatisfactory compliance with the agreed terms and conditions.

There are good reasons why the agreed resolution of disputes should not involve continuing oversight by a federal court. The termination of litigation should mean that parties are returned to their ordinary relations in our society, where most actual or potential disputes are discussed, compromised, and solved without formal intervention, or at least without formal intervention by a federal court. The continuing involvement of the court would deter the parties from attempting to work out their problems on their own. Moreover, the imposition of further direction by a court is not the most practical means of minimizing disagreements, nor the most effective approach to achieving voluntary compliance.

The continuing judicial involvement contemplated in the ruling below, moreover, would impose mounting demands on scarce judicial resources. It could generate a sizeable transfer of contractual breach-of-settlement claims from the state courts to the federal courts. Every case that is filed in federal court and eventually dismissed pursuant to a settlement, which is the vast majority of cases, would have the potential to impose a continuing burden on the court's docket, extending in perpetuity. This is not the vision of the proper scope of judicial authority that Congress has implemented in the jurisdictional statutes, and it should not be accepted by this Court either.

In addition, the role of the courts endorsed in the ruling below cannot be squared with a proper understanding of judicial self-restraint. Respondent claims that allowing the parties easy access to the federal courts to enforce settlement terms will actually tend to conserve judicial resources by encouraging settlement and voluntary compliance. Opp. at 17. The claim, however, is wrong.

First, this claim ignores the unavoidable fact that any supposedly easy access to the federal courts for some

litigants can only be purchased at the expense of the access available to others. By the same faulty logic, a broadening of federal jurisdiction to include every conceivable legal claim should discourage violations of law, and hence reduce the number of lawsuits, because complaining parties will enjoy readier access to the federal courts. But nobody, and certainly not the Congress, has ever believed that it would be appropriate to expand the federal judicial authority in such boundless fashion.[7]

More important, though, is the fact that federal courts can only be given jurisdiction by law. The Constitution and the Congress certainly have not granted such sprawling authority to the federal courts, and parties "have no power to require of the court continuing enforcement of rights the statute no longer gives." *Wright*, 364 U.S. 642, 652 (1961) (discussing consent orders). The only other possible basis on which the courts could rest such authority would be their own proper orders that carry the binding force of law. When an order of the court contains terms and conditions that bind the parties, that order is law and can be enforced in further proceedings without exceeding the court's authority. But any such enforcement partakes of the court's inherent contempt powers, which are narrowly construed to achieve their central purpose of upholding the court's authority to enforce its own lawful orders. As the Court has stressed, however, when the contempt power is invoked, "a court must exercise 'the least possible power adequate to the end proposed.' " *Spallone*, 493 U.S. at 280 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)) (internal quotes

[7] The Court considered a similar argument in *Bloom v. Illinois*, 391 U.S. 194 (1968), where it reconsidered *In re Debs*, 158 U.S. 564 (1895), which had upheld free use of the summary contempt power in part because of the greater efficiency of having the original court determine whether the accused had complied with its orders. In *Bloom*, however, the Court strongly rejected the contention that "to submit the qustion of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." 391 U.S. at 208. The same logic applies to the issue of having enforcement disputes about settlement agreements heard in the state courts rather than the federal court in which the case originally was filed.

omitted). A more swollen version of that authority, as represented by the ruling below, is not consistent with the self-restraint that is necessary and appropriate to the federal courts. *See, e.g., Offutt v. United States*, 348 U.S. 11, 13 (1954) (stressing "importance of assuming alert self-restraint" in judge's exercise of summary contempt power).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, this Court should reverse the unpublished decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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